FILE COPY.

Office Supreme Court, U. S.
FILED.
DEC 7 1906
JAMES H. McKENNEY,
CLERK.

No. 139.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D., 1906.

WILMINGTON STAR MINING COMPANY,
Plaintiff in Error,
vs.
MINNIE FULTON,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Suggestions in Opposition to Motion to Dismiss Appeal and Affirm Judgment.

CHARLES S. HOLT,
ARTHUR D. WHEELER,
WILLIAM P. SIDLEY,
ATTORNEYS FOR PLAINTIFF IN ERROR

BARNARD & MILLER, PRINTERS, CHICAGO

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1906.

NO. 139.

WILMINGTON STAR MINING COMPANY, *Plaintiff in Error,* *vs.* MINNIE FULTON, *Defendant in Error.*	In Error to the Circuit Court of the United States for the Northern District of Illinois.

Suggestions in Opposition to Motion to Dismiss Appeal and Affirm Judgment.

MAY IT PLEASE THE COURT:

The sole question presented by this motion to dismiss is that of *jurisdiction.* If "the Constitution or law of a State is *claimed* to be in contravention of the Constitution of the United States," then, under Section 5 of the Court of Appeals Act of March 3, 1891, this court has jurisdiction to review this record. Such jurisdiction does not depend upon the soundness or unsoundness of plaintiff in error's contention as to the constitutional question raised, nor is this court limited in its review to a consideration of such constitutional question only. It may uphold the constitutionality of the statute complained of and yet reverse the judgment upon other errors assigned, provided always, of course, that

the claim of contravention is not a frivolous one, a mere claim in words only, but real and substantial.

Tested by these familiar principles, what lack of jurisdiction can be discerned upon this record, even if we admit, for the sake of the argument, that the whole case hangs upon the first count of the declaration?

In the face of defendant's request for instructions to the jury, first, to return a verdict of "not guilty," on the ground that the Mining Act of Illinois "upon which *this action* is based and upon which *each of the counts* is based," is contrary to the Fourteenth Amendment, etc. (Rec., 92), and, second, that plaintiff could not recover under the *first* of the eighth counts of her declaration upon which this action proceeds for the reason that the provisions of the Illinois Mining Act, upon which said count is based, are contrary to the Constitution of the United States (Rec., 105), it will not be asserted, nor even suggested, we think, that the defendant did not *claim* that a state law upon which this first count rested was in contravention of the Constitution of the United States. That this claim was not a frivolous one, but real and substantial, appears from the nature of the claim itself, and no argument can make it clearer. It is totally unlike the claims asserted in *Western Union Tel. Co.* v. *Ann Arbor R. R. Co.*, 178 U. S., 239, and *Lampasas* v. *Bell*, 180 U. S., 276, and other cases cited by counsel. In the *Western Union* case the court pointed out that whether the suit arose "under the Constitution and laws of the United States" depended on complainant's statement of its own case, and, fur-

ther, that, upon reference to the bill, it was evident that the case was framed wholly upon the theory of a threatened breach of contract and not upon a right conferred by a federal statute. This case was, moreover, *reversed upon full hearing*, and not dismissed on motion. In the *Lampasas* case the suit was dismissed, not upon the ground that no constitutional question had been raised, but because the plaintiff in error had no legal interest in the constitutional question before the court. No such question arises in the case at bar, in which defendant's liability can be fixed only after an adjudication upon the constitutionality of the Illinois Mining Act adverse to its contention. If further light is needed upon the reality and *bona fides* of this claim that a constitutional question is involved, it is to be found in the fact that the highest court in Pennsylvania, as pointed out in our original brief, has pronounced a statute of that State, substantially similar to that now under consideration, unconstitutional, upon the exact ground relied upon in this case.

The real basis of this motion to dismiss is, that, *in the opinion of counsel for defendant in error*, the first count is not open to the charge of unconstitutionality brought against it, however sound such charge may be as to the other seven. But this charge has been made against the first count in common with the others, and supported by every argument at our command, and the soundness of counsel's contention can only be determined after this court has analyzed the Mining Act and determined upon whom the duties involved in the first count are placed, and after it has further determined, should it find

that such duties are imposed upon the owner, whether the unconstitutional features involved in the other seven counts do not invalidate the entire act, so as to exclude the possibility of a cause of action being based upon any of its provisions. In other words, the court must assume jurisdiction of the case in order to determine the questions at the basis of this motion, which counsel assume to decide in their own favor, and will then affirm or reverse the judgment upon the merits not only of the constitutional question raised, but of every other question of error properly assigned upon the record.

We deem it unnecessary to discuss the questions raised by counsel regarding the Illinois Practice Act, as they relate to the affirmance or reversal of a case upon the merits, and not to any question of jurisdiction here involved, and do not eliminate the substantial claim of unconstitutionality aimed against the first count, which is decisive upon this motion.

We append a brief reference to cases in this court which lay down the principles of law above stated, and in view of the argument advanced in support of the motion to dismiss to the effect that the first count is based upon duties imposed on the owner or operator, and not upon the mine officials, we conclude with an amplification of our former statement upon that point, found at page 4 of our original brief. The court's instruction (Rec., 96) referred to in such former statement, either requested or acquiesced in by plaintiff at the time, induced the belief that counsel's views accorded with our own upon that proposition.

THE JURISDICTION OF THIS COURT DEPENDS UPON THE EXISTENCE OF A SUBSTANTIAL CLAIM THAT A STATE LAW IS IN CONTRAVENTION OF THE CONSTITUTION OF THE UNITED STATES, AND NOT UPON THE SOUNDNESS OF SUCH CLAIM. WHEN JURISDICTION IS SO ACQUIRED THE COURT WILL CONSIDER ALL QUESTIONS PROPERLY RAISED UPON THE RECORD.

In *Holder* v. *Aultman*, 169 U. S., at pages 88-89, this court said:

> "This was, therefore, a 'case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States,' and was rightly brought directly to this court by writ of error under the Act of March 3, 1891, C. 517, Sec. 5. Upon such a writ of error, differing in these respects from a writ of error to the highest court of a State, the jurisdiction of this court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below, and the jurisdiction of this court is not limited to the constitutional question but includes the whole case. *Whitten* v. *Tomlinson*, 160 U. S., 231, 238; *Penn Ins. Co.* v. *Austin*, 168 U. S., 685.
>
> "But this court has not found it necessary to pass upon the constitutional question because it is of opinion that the contract was not within the statute set up by the defendant."

The court having thus acquired jurisdiction of the case by reason of the claim that the Michigan statute in question was in contravention of the Constitution of the United States, proceeded to dispose of the case solely upon the other grounds than that of constitutionality presented by the record.

In *Penn Ins. Co.* v. *Austin,* 168 U. S., 685, cited in the *Aultman* case, *supra,* it is said at page 695:

> "But the words of the statute, which empower this court to review directly the action of the Circuit Court, are that such power shall exist wherever it is claimed on the record that a law of a State is in contravention of the Federal Constitution. Of course, the claim must be real and colorable, not fictitious and fraudulent. The contention here made, however, is, not that the bill, without color of right, alleges that the state law and city ordinances violate the Constitution of the United States, but that such claim as alleged in the bill is legally unsound. The argument, then, in effect is that the right to a direct appeal to this court does not exist where it is claimed that a state law violates the Constitution of the United States, unless the claim be well founded. *But it cannot be decided whether the claim is meritorious and should be maintained without taking jurisdiction of the case.* The authorities referred to as supporting the position indicate that the argument is the result of a confusion of thought, and that it arises from confounding the power of this court to review on a writ of error the action of a state court with the power exercised by this court, under the Act of 1891, to review by direct appeal the final action of the Circuit Court where, on the face of the record, it appears that the claim was made that the statute of a State contravened the Constitution of the United States. These classes of jurisdiction are distinct in their nature, and are embraced in different statutory provisions. Having jurisdiction of the cause, there exists the power to consider every question arising on the record. *Horner* v. *United States,* 143 U. S., 570."

In *Loeb* v. *Columbia Township Trustees,* 179 U. S., 477, it is said by the court in discussing the

right of plaintiff in error to bring the case directly from the Circuit Court:

"By the fifth section of the Circuit Court of Appeals Act of March 3, 1891, appeals or writs of error may be prosecuted to this court from the Circuit Court '*in any case* in which the Constitution or law of a State is *claimed* to be in contravention of the Constitution of the United States.'" (The italics are those of the court.) "It is said that even if the record shows such a claim to have been made, it will not avail the plaintiff; for, it is argued, when the jurisdiction of the Circuit Court is invoked by the plaintiff only on the grounds of diverse citizenship, a claim by the *defendant* of the repugnancy of a State law to the Constitution of the United States is not sufficient to give this court jurisdiction, upon writ of error, to review the final judgment of the Circuit Court sustaining such claim. Such an interpretation of the fifth section is not justified by its words. Our right of review by the express words of the statute extends to 'any case' of the kind specified in the fifth section. And the statute does not in terms exclude a case in which the Federal question therein was raised by the defendant. That section differs from Section 709 of the Revised Statutes relating to the review by this court of the final judgment of the highest court of a State in this, that under the latter section we can review the final judgment of the State court upon writ of error sued out by the party who is denied a right, privilege or immunity specially set up or claimed *by him* under the Constitution or laws of the United States; whereas the Circuit Court of Appeals Act does not declare that the final judgment of a Circuit Court in a case in which there was a claim of the repugnancy of a State statute to the Constitution of the United States may be reviewed here only upon writ of error sued out by the party making the claim. In other words, if a claim is

made in the Circuit Court, no matter by which party, that a State enactment is invalid under the Constitution of the United States, and that claim is sustained or rejected, then it is consistent with the words of the act, and, we think, in harmony with its object, that this court review the judgment at the instance of the unsuccessful party, whether plaintiff or defendant.

"It was the purpose of Congress to give opportunity to an unsuccessful litigant to come to this court directly from the Circuit Court in every case in which a claim is made that a State law is in contravention of the Constitution of the United States."

And again, at page 485, it is said:

"The result is that this court has jurisdiction to review the judgment of the Circuit Court, and to determine every question properly arising in the case. We may, therefore, determine whether the court below erred in sustaining the demurrer to the petition."

The court then proceeds to consider the case upon all the question raised.

In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 544, it is said:

"Defendant in error insists that these cases should have gone to the Circuit Court of Appeals, and has moved on that ground that the writ of error be dismissed. The defense in each case was based in part on the Illinois Statute of 1893. The plaintiff insisted at the trial that the statute was in violation of the Constitution of the United States, and its position was sustained by the Circuit Court. There have been suits in which the Circuit Court upon the claim of the defendant has applied the Constitution of the United States to the case before it and put the plaintiff out of court. Here the

> plaintiff claimed that the State enactment upon which defendant relied was unconstitutional, and its position upon that point was sustained."

The court then quotes *Loeb* v. *Columbia Township Trustees*, 179 U. S., 477, above quoted, and concludes, "Upon the authority of that case the motion to dismiss is denied."

> "It was suggested at bar that this court was without jurisdiction. But it is unquestionable that rights under the Constitution of the United States were expressly and in due time asserted, and that the effect of the judgment was to deny these rights. Indeed, when the argument is analyzed we think it is apparent that it but asserts that, as the court below committed no error in deciding the Federal controversy, therefore there is no Federal question for review. *But the power to decide whether the Federal issue was rightly disposed of involves the exercise of jurisdiction. Penn Mutual Life Insurance Company* v. *Austin* (1897), 168 U. S., 685. As the Federal question was not unsubstantial and frivolous, we pass to a consideration of the merits of the case." *Andrews* v. *Andrews*, 188 U. S., 28 (1902).

THE ENTIRE MINING ACT OF ILLINOIS IS UNCONSTITUTIONAL AND NO RIGHT OF ACTION CAN BE BASED THEREON.

The principles applicable to the question whether, after the elimination of an unconstitutional provision of an Act, the remainder can be held enforceable, are well settled by the adjudications of this court as pointed out in *Connolly* v. *Union Sewer Pipe Company*, 184 U. S., at 565:

> "If different sections of a statute are inde-

> pendent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced, but if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the Legislature, then the entire statute must be held inoperative."

In that case, this court held that while the first section of the Act then under consideration embraced by its terms *all* persons, firms, corporations, or associations of persons who combine their capital, skill or acts for any of the purposes specified, the ninth section, which was held to be unconstitutional, declared that the statute should not apply to agriculturists or live stock dealers in respect of their products or stock in hand, and that to enforce the Act after eliminating the ninth section would result in reaching and fining agriculturists and live stock dealers, notwithstanding it was clear from the terms of the Act as enacted that the Legislature intended to exempt these two classes from its operation. It was, therefore, concluded that the Legislature would not have enacted this statute had it understood that agriculturists and live stock dealers were to be included in its operation, and the entire Act was therefore held to be unconstitutional.

In the case at bar, that part of Section 33 which prescribes the civil remedy for its violation, reads as follows: "For *any injury* to person or property occasioned by *any wilful violations of this Act* or wilful failure to comply with *any of its provisions,* a right of action shall accrue to the party injured for any direct damages sustained thereby." This provision has been construed by the Supreme Court of Illinois to read: "For any injury to person or

property occasioned by any wilful violations of this Act or wilful failure to comply with any of its provisions, a right of action *against the owner or operator of the mine* shall accrue to the party injured for any direct injuries sustained thereby." We contend that, thus interpreted, the provision in question is unconstitutional, for reasons already set forth in our original brief. But if that portion of the Act which purports to give a civil remedy for injuries resulting from the violation of those duties which are imposed by the Act upon the mine manager, examiner, and hoisting engineer, is unconstitutional, then there is no longer a valid section of the Act which gives such remedy for those violations, notwithstanding the clear intention of the Legislature, as expressed in the language above quoted, that a right of action should exist for an injury which resulted from *any* wilful violations of the Act or wilful failure to comply with *any of its provisions*. To continue the Act in force, therefore, for the purpose of allowing only actions against the owner on account of the violations of duties imposed only upon the owner, and to permit the scores of obligations imposed by the Act upon the mine officials and other employes to be violated without any right of civil remedy in behalf of the injured parties, is to continue in force a law which the Legislature of Illinois would never have enacted as an original piece of legislation. It is unnecessary to multiply authorities in support of the principles for which we are here contending, as the *Connolly* case above cited alone furnishes an analogy to the situation here disclosed which is sufficient in itself to dispose of this question.

THE FIRST COUNT IS BASED UPON DUTIES IMPOSED BY THE ACT UPON THE MINE OFFICIALS AS DISTINGUISHED FROM THE OWNER OR OPERATOR.

Section 19 of the Illinois Mining Act upon the first paragraph of which the first count of the declaration in this case is based, merely prescribes in greater detail than theretofore employed, the duties respecting ventilation previously imposed by the Act upon the mine manager and mine examiner. This is clearly shown by a reading of Sections 16 and 18 of the Act in connection with Section 19. This Section 16 provides in paragraph (b) "it shall be the duty of the *mine manager* to see that cross-cuts are made at proper distances apart to secure the best ventilation at the face of all working places," and this is further amplified in Section 19 in the paragraph marked "Cross-cuts (g)" which provides sixty feet apart as the maximum distance between cross-cuts; thus further defining what the Legislature considered as "proper distances." The same paragraph of Section 16 requires the mine manager to see "that all stoppings along air ways are properly and promptly built," and in Section 19 paragraph (h) headed "Stoppings" the Act defines what it means by "properly built" by prescribing that "the stoppings shall be built in a substantial manner with brick or other suitable building material, laid in mortar or cement, if practicable, but in no case shall they be built of lumber except for temporary purposes."

The same paragraph (b) of Section 16 further provides that the *mine manager* "shall keep careful

watch over all ventilating apparatus and the air currents in the mine," and the next paragraph (c) provides that "he shall measure or cause to be measured the air current with an anemometer at least once a week at the inlet and outlet, and shall keep a record of such measurements for the information of the inspector." Furthermore, the first paragraph (a) of Section 18 requires the *mine examiner* to see "that the air current is traveling in its proper course and in proper quantity." Thus, the whole responsibility of the *management and operation* of the ventilation in the mine as distinguished from the furnishing of the physical agencies for that purpose, is clearly and explicitly placed upon the mine manager and mine examiner, thus consistently adhering to the purpose of the Act already pointed out by us at page 31 of our original brief to make the mine owner or operator responsible for the location, physical equipment and external supervision of the mine and the mine manager, examiner and other mine officials responsible for its interior management. No modification of this purpose is shown by Section 19 which proceeds to deal in greater detail with the duties regarding ventilating currents and apparatus thus imposed upon the mine manager and examiner by Sections 16 and 18, above quoted. Thus the "proper quantity" of air referred to in Section 18 (a) is defined in Section 19 as "fresh air sufficient for the health and safety of all men and animals employed therein," and still more minutely in paragraph (a) as "not less than 100 cubic feet per minute for each person and not less than 600 cubic feet per minute for each animal in the mine";

the "proper course" of the air current is further enlarged upon in the same paragraph, Section 19 (a), by providing that "said currents shall be forced into every working place throughout the mine, so that all parts of the same shall be reasonably free from standing powder smoke and deleterious air of every kind"; while the measurements of air currents which the mine manager must make with an anemometer in accordance with Section 16 (c) are further treated in Section 19 (b) and the provision added that "a record of such measurements shall be made and preserved in the office as *elsewhere provided for in this Act*"—referring, obviously, to Section 16 (c) where such record is required to be kept by the mine manager, for the information of the inspector.

The only provision of Section 19, which, it may be said in any way refers to a duty of the owner is the requirement that the ventilation in question shall be produced by a fan or some other artificial means, and no complaint is made of any neglect or insufficiency in that regard. On the contrary, the evidence clearly shows, without any contradiction, that a fan had been installed in the west entry, where the accident occurred, for a long time prior to the explosion, and served air therein to *twelve or fourteen men* daily, (Rec., 40, side page 59), while there were but two in the entry at the time of the explosion in question. There is no suggestion in Section 19 that the duties in relation to the maintenance of fresh air and the supervision of ventilating apparatus in the mine previously imposed by Sections 16 and 18 upon

the mine manager and mine examiner are in any respect diminished or transferred to the owner of the mine, but the entire removal of the owner's authority in connection with such matters is, if anything, made the more manifest by the insertion of the provisions that the *inspector* may increase the current of air in the mine above the specified amount at his discretion,—thus, by plain implication, forbidding the owner to regulate the air in his own mine.

It is further to be noted that this case was tried and submitted to the jury upon the theory that the duty relied upon in the first count of the declaration was that of the *mine manager*, as shown by the court's instruction to the jury already alluded to.

Respectfully submitted,

CHARLES S. HOLT,
ARTHUR D. WHEELER,
WILLIAM P. SIDLEY,
Attorneys for Plaintiff in Error.